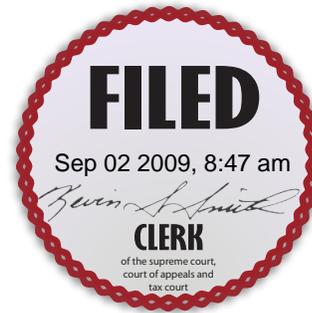


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

TRACY GOODALL,)
)
Appellant-Defendant,)
)
vs.) No. 49A04-0901-CR-17
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven R. Eichholtz, Judge
The Honorable Peggy R. Hart, Master Commissioner
Cause No. 49G23-0712-FB-270063

September 2, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Tracy Goodall appeals from his convictions for Possession of Cocaine, as a Class B felony, and Criminal Trespass, as a Class A misdemeanor. Goodall raises the following two issues for our review:

1. Whether the State presented sufficient evidence to support his conviction for possession of cocaine.
2. Whether the State presented sufficient evidence to support his conviction for criminal trespass.

We reverse.

FACTS AND PROCEDURAL HISTORY

On November 30, 2007, Alice Lockett, who had been renting a government-subsidized apartment from Amber Woods Apartments (“Amber Woods”), tendered to Amber Woods management a statement of her intent to terminate her lease to that apartment. The termination expressly stated that it was not effective until January 1, 2008, and Lockett reserved the right to revoke her intent to terminate at any time before the effective date.

On December 17, 2007, Officer Richard Weaver, among others, from the Indianapolis Metropolitan Police Department responded to a request of Amber Woods employees to investigate a potential trespasser in Lockett’s apartment. Upon arriving at the apartment, Allen Parker opened the door. Officer Weaver entered the apartment, where he saw Paul Tyler and Goodall. Goodall was walking out of the hallway and into the living room.

Officer Weaver instructed the three men to stop what they were doing and to be cooperative while he searched the apartment, and the three men complied. Although the apartment was mostly empty, Officer Weaver found a Pyrex cup containing cocaine residue near the stove, and, above the stove, he found a small wad of paper, a digital scale, and a plastic bag containing 2.995 grams of rock cocaine. In a bedroom closet, Officer Weaver found an assault rifle partially covered with men's and women's clothing, along with seven rounds of ammunition, a bottle of whisky, dice, and a gold mouthpiece belonging to Goodall.

Parker told Officer Weaver that an "older [b]lack lady" had given Parker permission to be in the apartment. Transcript at 89. Goodall also told the officers that he had permission to be there, although he did not say who gave him that permission. None of the occupants were on Amber Woods' trespass list for prior unauthorized entries.

On December 19, the State charged Goodall¹ with possession of cocaine, as a Class B felony; possession of cocaine and a firearm, as a Class C felony; and criminal trespass, as a Class A misdemeanor. After a jury trial, Goodall was found guilty as charged. The trial court entered its judgment of conviction on the Class B possession and criminal trespass convictions² and sentenced Goodall accordingly. This appeal ensued.

¹ The State also charged Parker and Tyler, but they are not parties to this appeal. We recently affirmed Parker's convictions in a separate appeal. Parker v. State, No. 49A04-0810-CR-620, 2009 WL 1766523 (Ind. Ct. App. June 23, 2009), trans. pending.

² The trial court merged the possession of cocaine and a firearm conviction with the possession of cocaine conviction.

DISCUSSION AND DECISION

Standard of Review

In each issue on appeal, Goodall challenges the sufficiency of the State's evidence underlying a conviction. When reviewing a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the verdict and the reasonable inferences that may be drawn from that evidence to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

Issue One: Possession

Goodall first contends that the State did not present sufficient evidence that he possessed the cocaine found in the apartment. In order to prove that Goodall possessed cocaine, as a Class B felony, the State was required to prove beyond a reasonable doubt that Goodall “knowingly or intentionally possesse[d] . . . less than three (3) grams of pure or adulterated cocaine . . . in . . . a family housing complex.” Ind. Code § 35-48-4-6(b)(2)(B)(iii). Possession of contraband may be either actual or constructive:

Actual possession occurs when a person has direct physical control over the item. Walker v. State, 631 N.E.2d 1, 2 (Ind. Ct. App. 1994). Constructive possession occurs when somebody has “the intent and capability to maintain dominion and control over the item.” Id. We suggested in Woods[v. State, 471 N.E.2d 691 (Ind. 1984)] that knowledge is a key element in proving intent:

When constructive possession is asserted, the State must demonstrate the defendant's knowledge of the contraband. This knowledge may be inferred from either the exclusive

dominion and control over the premise containing the contraband or, if the control is non-exclusive, evidence of additional circumstances pointing to the defendant's knowledge of the presence of the contraband.

Woods, 471 N.E.2d at 694 (citations omitted). Proof of dominion and control of contraband has been found through a variety of means: (1) incriminating statements by the defendant, (2) attempted flight or furtive gestures, (3) location of substances like drugs in settings that suggest manufacturing, (4) proximity of the contraband to the defendant, (5) location of the contraband within the defendant's plain view, and (6) the mingling of the contraband with other items owned by the defendant.

Henderson v. State, 715 N.E.2d 833, 835-36 (Ind. 1999). "Mere proximity to the drug, mere presence on the property where it is located, or mere association, without more, is insufficient to support a finding of possession." Hurst v. Dep't of State Revenue, 721 N.E.2d 370, 374-75 (Ind. Tax Ct. 1999).

Here, the State does not dispute that it attempted to demonstrate that Goodall was in constructive, non-exclusive possession of the cocaine. But the State also does not dispute that it presented no evidence of any of the six additional circumstances discussed in Henderson that are used to establish such possession. See 715 N.E.2d at 835-36. Rather, the State's only evidence against Goodall on this issue was Goodall's mere presence in the apartment where the cocaine was found, which is insufficient to support a finding of possession. See Hurst, 721 N.E.2d at 374-75. Thus, the State concedes, and we agree, that "the evidence here is insufficient to sustain Defendant Goodall's conviction for possession of cocaine." Appellee's Brief at 5. Accordingly, Goodall's conviction on that charge must be reversed.³

³ As the State notes in its appellate brief, the facts of Goodall's presence in the apartment are different from those of Parker's. See Appellee's Brief at 4. In Parker's recent appeal to this court, we affirmed his conviction for possession of cocaine "in view of the fact that he admittedly had been living

Issue Two: Trespass

Goodall next argues that the State did not present sufficient evidence that he committed criminal trespass. In order to prove criminal trespass, as a Class A misdemeanor, the State was required to demonstrate beyond a reasonable doubt that Goodall “knowingly or intentionally interfere[d] with the possession or use of the property of another person without the person’s consent.” I.C. § 35-43-2-2(a)(4). In its charging information, the State alleged that Goodall had interfered with Amber Woods’ possession or use of the property. Appellant’s App. at 24. The State did not allege that Goodall had interfered with Lockett’s possession or use of the property. *Id.* Neither did the State allege that Goodall knowingly entered the dwelling of another person without that person’s consent, which would have been a valid charge of criminal trespass.⁴ See I.C. § 35-43-2-2(a)(5).

Goodall contends that, because Lockett’s termination notice was not effective at or before the date of his alleged trespass, Amber Woods had no relevant interests in the apartment at the time he was arrested and, therefore, he could not be convicted for interfering with its interests. We must agree that, because Lockett had leased the apartment through the end of December 2007, her interests are the only interests relevant to a charge of criminal trespass within that apartment through that date. Thus, the State could not convict Goodall for criminal trespass on the theory that Goodall’s presence in

there for several days.” Parker, 2007 WL 1766523 at *2. Goodall, on the other hand, never admitted to being in the apartment for any substantial length of time, nor did the State present any evidence to support such a suggestion.

⁴ In both of these respects, the State’s charges against Goodall are materially different from its charges against Parker.

the apartment had interfered with the lessor's interests in the possession or use of the property.

Nonetheless, in support of the conviction the State offers two theories. First, the State suggests that Goodall claimed to have permission to be in the apartment but could not provide identifying information of the person who gave that permission. While that is true, consent is only relevant if the defendant interferes with the consent giver's possession or use of the property. See I.C. § 35-43-2-2(a)(4). But the State alleged that Goodall interfered with Amber Woods' interests in the apartment, not with Lockett's. Again, at the time of Goodall's conduct, Amber Woods had no present interests in the possession or use of the apartment in light of its lease with Lockett. It is therefore irrelevant whether Goodall obtained permission to interfere with those interests.

The State also asserts that "evidence was presented that the apartment was virtually empty and Mrs. Lockett had tendered an intent to terminate her lease, leaving the jury with the likely conclusion that Mrs. Lockett had already vacated the apartment." Appellee's Brief at 6. We might be inclined to agree with the State if there was any evidence whatsoever that Amber Woods exercised actual, exclusive control over the apartment before December 17, 2007, such as if Lockett had submitted her keys to Amber Woods management along with her termination notice. But that evidence is not in the record. Rather, the only evidence is that Lockett still held the apartment as lessee until (at least) January 1, 2008. Again, the question the jury was asked to consider was whether Goodall's presence in the apartment interfered with Amber Woods' possession

or use of that apartment. The only possible answer to that question, on these facts, is no.

We must therefore reverse Goodall's conviction for criminal trespass.

Reversed.

KIRSCH, J., and BARNES, J., concur.